UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

In the matter of:

GUARDSMARK, LLC,

Employer,

Case No. 5-RC-143199

and

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA),

Petitioner.
_____/

PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REPORT ON OBJECTIONS

Petitioner International Union, SPFPA hereby opposes the Employer's Request for Review of Report on Objections. It is apparent from the Employer's Objections and Request for Review of Report on Objections that the Employer is not alleging any specific misconduct stemming from the subject election, as the Employer has put forth no facts or Board precedent that warrants overturning the results of the election. Instead, the Employer is objecting to the general process of mail-ballot elections. As such, the Report on Objections should be upheld by the Board.

Objection 1: **The Regional Director Abused His Discretion by Insisting on Mail Balloting.**

Objection 1 is without merit and was dismissed rightfully by the Regional Director. The Employer argues that it bypassed its right to a hearing because the Regional Director indicated that the Region preferred a mail ballot election in this case, which, according to the Employer, would have rendered a hearing meaningless.

It is undisputed that the parties, including the Employer, entered into a Stipulated Election Agreement wherein it was agreed that the election would be conducted via mail ballot. By agreeing to the mail ballot election, the Employer has waived its right to later change its mind. It has also waived its right to later challenge the method of balloting. As cited by the Region Director in the Report on Objections, Board precedent supports a finding that the Employer waived its right to object to the manner of balloting in this case. See *Premier Living Center*, 331 NLRB 123 (2000).

Moreover, pursuant to the NLRB CHM Section 11084.3, in order to enter into a stipulated election, "all details must be agreed upon." In fact, "failure of accord in such details as date, hours, or place of election will serve to send a matter to hearing." Based on this, while perhaps costly, the Employer had a right to argue at a hearing that a manual ballot was appropriate. An adverse ruling could have been appealed through the appropriate channels. Instead, the Employer agreed to hold a mail ballot election. Any challenge to the manner of balloting is thereby moot.

<u>Objection 2</u>: The Board Improperly Prohibited Guardsmark from Holding Mass Meeting with Employees on the Morning Ballots were Scheduled to be Mailed.

Objection 2 is utterly without merit and was dismissed rightfully by the Regional Director. Conveniently, the Employer has ignored well-established Board precedent in arguing that employers have a right to hold mass meetings on the same day that ballots are mailed to employees.

Per the Board's ruling in *American Red Cross Blood Servs.*, 322 NLRB 401 (1996), the 24-hour prohibition against mass meetings by employers prior to the start of an election as established in *Peerless Plywood Co.*, 107 NLRB 427 (1953), applies to mail ballot elections as well as manual ballot elections. At the very least, in "mail ballot elections, the time restriction on

massed assemblies begins with the date of the mailing of the ballots by the Regional Director." *The Developing Labor Law*, BNA Books, 6th Ed. (2012), pg. 543.

The Employer's reliance on the holding in *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959), is misplaced. In that case, the Board found that a mass meeting held within the 24-hour period did not violate the Act because the Employer did not receive advance notice of the date and time that the Regional Director was sending out the mail ballots. In contrast, the Board held in *American Red Cross Blood Servs.*, that the Region's failure to send a formal notice of the date and time was immaterial where the employer entered into a stipulated election agreement that included the date. The employer in that case also sent out a memo to employees after the stipulated agreement was effective informing them of the procedures for the election, including the date that the ballots would be sent by the Region. Thus, the Board rejected the employer's contention that it was unaware of the election details.

In the case at hand, the stipulated election agreement included the date and time that the ballots would be sent. The employer also received advanced copies of the Notice of Election that noted the date and time that the ballots would be sent. For these reasons, there was no basis for allowing the Employer to hold a mass meeting on the very day that the ballots were sent, as it would have been a clear violation of the 24-hour rule found in *Peerless*.

Objection 3: **Board Failed to Mail Duplicate Ballot Kits to Voters Who Did Not Sign Identification Stub.**

Objection 3 is also without merit and should have been dismissed entirely by the Regional Director. To the extent that the objection was not dismissed, any failure in issuing the two duplicate ballot kits in question was not a sufficient defect in the election procedures to warrant a new election.

Pursuant to NLRB CHM Section 11336.4(b), where "a ballot is returned without signature, the election support staff person should, *if sufficient time remains before the deadline*, send a duplicate kit with a letter explaining that failure to sign voids a returned ballot." (emphasis added). See also *Oneida County Community Action Agency*, 317 NLRB 852 (1995).

As the Employer rightly pointed out, "[f]ailure of the Region to provide duplicate mail ballot kits to voters who fail to sign the identification stub can be grounds for setting aside an election where the votes may be determinative." Employer's Objections at pg. 5 (emphasis added).

The Employer relies on *Davis & Newcomer Elevator*, 315 NLRB 715 (1995), for its argument that the election should be set aside because two voters who did not sign the identification stub did not receive duplicate kits. In that case, one person out of eight eligible voters did not receive a duplicate kit after the Region determined who had sent back the unsigned ballot. Because the final vote tally was 4-3, the single vote could have been determinative of the outcome. However, there was no evidence on the record to indicate whether or not there was enough time before the deadline to get a kit to the individual. Under those facts, the Board ruled that the Regional Director's error was material and remanded the case to the Region to decide whether the individual in question was eligible to vote for other reasons.

In this case, there were only two ballots out of an eligible 33 that were returned without the identification stub signed. The tally of ballots was 11 for the Petitioner and 2 against. The two ballots in question, standing alone, would not be determinative of the outcome of the election, nor do they represent a sufficient percentage of the total bargaining unit to amount to a material error in the election procedures. Thus, the objection should have been dismissed.

Instead of dismissing the objection in its entirety, the Region Director ruled that at the hearing the objection would be analyzed for the limited purpose of deciding whether the

Employer's other objections called enough ballots into question to render the void ballots potentially determinative. As the Employer's remaining objections are meritless, in both fact and law, the void ballots will have no effect on the outcome of the election.

Objection 4: **One Third of Eligible Voters Did Not Receive Ballots.**

Objection 4 is without merit and should have been dismissed by the Regional Director. Instead, the Regional Director agreed to hear evidence at a hearing as to which employees did not receive ballots and what steps those employees took, if any, to rectify the situation. In response, the Employer argues that its "objection is more than simply whether the employees received ballots and had an opportunity to call." (Request, P. 9).

The Employer contends that eleven of the eligible voters did not receive mail ballots. (Request, p. 9). In support of its contention, the Employer relies on affidavits from members of its management team that amount to hearsay evidence. According to the Employer, those eleven employees "were denied the opportunity to vote through no fault of their own." The Employer further claims that providing employees with a telephone number to call if they did not receive ballots shifts the onus from the Board to the employees.

It is well established that the objecting party has the burden of proving its objections. (See nlrb.gov). With respect to the instant objection, the first thing the Employer must prove is that eleven employees did not receive adequate notice of the election and also did not receive mail ballots. If not eleven employees, then at least a sufficient number to necessitate a new election if the factors of *Sitka Sound Seafoods, Inc*., 325 NLRB 685 (1998), are met. Because there was a procedure for requesting a duplicate ballot if an employee did not receive a ballot by February 4, 2015, the Employer must also show that the contingency procedure failed sufficiently to warrant a new election. In order for the Employer to prove these elements at a hearing, as ordered by the

Regional Director, it is inconsequential what exactly caused the mail balloting to fail. That is, it would be immaterial to the Board's analysis whether the Region transcribed incorrectly the addresses from the eligibility list, or if something else caused the discrepancy. For these reasons, the Regional Director did not err in ordering a hearing to take the Employer's evidence in support of its objection.

Objection 5: **The Election Notice Did Not Provide Adequate Notice to Eligible Voters.**

Objection 5 is without merit and was dismissed properly by the Regional Director.

Under NLRB CHM Sections 11336.2(c) and 11336.3, both the Instructions included in the ballot kits and the Notice of Election *should* name a designated employee of the Region to field calls from voters about missing ballots or other questions. According to the Employer, the fact that Region 5 listed only a telephone number on the Notice of Election is sufficient cause to order a new election. As part of that, the Employer claims that the number leads to an automated system, and not to and actual person who could assist.

Setting aside the fact that the CHM does not necessarily mandate that an individual be named expressly on the Notice of Election, and the fact that the CHM is not binding authority[1], the reality is that an actual employee can be reached at the number listed on the document. The number employees were instructed to call if they did not receive their ballots by February 4, 2015, (410) 962-2219, is a direct line to Elections Specialist Johnson. A simple telephone call to the line reveals that if the Elections Specialist is not available to take a call, there is a message instructing callers to leave a message with details about why they are calling. If necessary, the Elections Specialist will call the employee for additional information before sending out a duplicate ballot.

[1] See *Superior Industries*, 289 NLRB 834 (1988).

Surely, this is Region 5's normal procedure in these matters and it gives voters ample instructions to rectify any missing-ballot issues. Providing this number is sufficient and does not disenfranchise voters who need assistance.

Interestingly enough, the Employer indicates in its Request for Review that "the testimony of employees at the hearing . . . suggested that including a telephone number in small print in the middle of three legal-size pages of legalese was utterly inadequate to provide employees with actual notice of how to request a mail ballot." (Request, p. 11). What the Employer failed, not surprisingly, to mention is that the vast majority of the witnesses at the hearing testified that they did not bother to even attempt to read the notice, and of those who did, only one of them bothered to call to request a duplicate ballot. The evidence relied upon by the Employer reveals voter apathy. Simply put, that is no basis for overturning the results of the election.

CONCLUSION

Based on the foregoing, Petitioner requests that the Board uphold the Regional Director's Report on Objections or dismiss the Employer's objections in their entirety.

Respectfully submitted,

Gregory, Moore, Jeakle & Brooks, P.C.

/s/ Michael J. Akins
By: Michael J. Akins
65 Cadillac Square, Suite 3727
Detroit, MI 48226
313-964-5600
313-964-2125 fax

Dated: April 9, 2015

PROOF OF SERVICE

I herby certify that on April 9, 2015, PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REPORT ON OBJECTIONS, was served upon the following parties via email and/or NLRB's E-File system:

Charles L. Posner, Regional Director
NLRB Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201
Charles.Posner@nlrb.gov

Stephen E. Glazek
Melonie L.M. Stothers
Attorneys for Employer, Guardsmark LLC
211 W. Fort Street, 15th Floor
Detroit, MI 48226
sglazek@bsdd.com
mstothers@bsdd.com

/s/ Michael J. Akins
MICHAEL J. AKINS